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No. 85-40

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

MASSACHUSETTS HOSPITAL SCHOOL, et al.,

Petitioners,

v.

RICHARD STOCK, a mentally disabled person, by and through his father and next friend, JOSEPH STOCK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

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52 pp

QUESTION PRESENTED

May a special education plaintiff, who must resort to judicial relief to force education officials to provide him with the process which he is constitutionally due, be awarded attorney's fees pursuant to 42 U.S.C. § 1988?

LIST OF PARTIES

MASSACHUSETTS HOSPITAL SCHOOL,
MASSACHUSETTS DEPARTMENT OF EDUCATION,
JOHN BRITT, as he is Superintendent
of Massachusetts Hospital School,
JOHN LAWSON, as he is Commissioner of
the Department of Education,
ROBERT POWERS, as he is the Director of
the Bureau of Institutiona Schools,
and LORRAINE ATKIN, as she is Program
Manager for the Brayton High School at
the Massachusetts Hospital School,

Petitioners,

v.

RICHARD STOCK, a mentally disabled person,
by and through his next friend,
JOSEPH STOCK

Respondent.

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RESPONDENT's BRIEF IN OPPOSITION

Respondent Richard Stock respectfully requests that the petition for a writ of certiorari to review the decision of the Supreme Judicial Court of Massachusetts be denied.

STATEMENT OF THE CASE

While respondent is satisfied with much of petitioner's Statement of the Case, a somewhat fuller summary of the decisions of the Massachusetts Supreme Judicial Court in this case is useful to assist consideration of whether further review by this Court would be appropriate.

Richard Stock is a multiply handicapped young man with brain injuries who resided in the Massachusetts Hospital School, an institution of the Massachusetts Department of Public Health, until after his high school graduation in June of 1981. The day school program at the Hospital School is and was in 1981 operated directly by the Massachusetts Department of Education. In its first decision in

this case, Stock v. Massachusetts Hospital School, et al., 392 Mass. 205, 467 N.E.2d 448 (1984) ("Stock I"), the Supreme Judicial Court ("S.J.C.") found that defendants, including Department of Education officials, had violated the procedural protections of state and federal special education statutes, G.L.c. 71B and the Education of All Handicapped Children Act, 20 U.S.C. § 1401 et seq. ("E.A.H.C.A.") by using "graduation" to termin te services to Stock without providing him and his parents with an opportunity to participate in that decision and without providing Stock and his parents with notice of his procedural rights as required by state and federal law. Id., 392 Mass. at 210-12, 467 N.E.2d at 453-4. The Supreme Judicial Court found that:

1. No change of special education services "seems quite so serious and worthy of parental involvement and procedural protections" as termination of services. Id., 392 Mass. at 211, 467 N.E.2d at 453;

2. Use of graduation to prematurely terminate special education services circumvents the express purpose of EAHCA- "to provide all special needs children with a free appropriate education." Id., 392 Mass. at 210, n.8, 467 N.E.2d at 453, n.8;

3. Department of Education officials did not comply with their own regulations regarding procedural protections and parental involvement. Id., 392 Mass. at 212, n.11, 467 N.E.2d at 453-4;

4. Stock's request for an administrative hearing regarding his grad-

uation was refused by the Department of Education, Id., 392 Mass. at 209, 213, 467 N.E.2d at 452, 454;[1]

5. "It is difficult to find justification for" defendants' termination of plaintiff's special education services in the circumstances of this case. Id., 392 Mass. at 211, 467 N.E.2d at 453.

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[1]Stock initially went directly to court and was told that he should have exhausted administrative remedies. See Memorandum and Order for Summary Judgment, in Appendix to Petitioner's Petition for a Writ of Certiorari, (hereinafter "Petitioner's Appendix") 45a-52a. However, when he attempted to invoke the jurisdiction of the Bureau of Special Education Appeals ("B.S.E.A.") of the Department of Education, his request was refused because, inter alia, he had received a diploma and therefore was not a "school-aged child" under the state statute. See letter from B.S.E.A. letter to plaintiff's counsel, Petitioner's Appendix, 42a-44a. The Supreme Judicial Court found that exhaustion was futile in these circumstances. Id., 392 Mass. at 213, 467 N.E.2d at 454.

The Supreme Judicial Court declined to reach plaintiff's constitutional due process claims because it had resolved Stock's claims on statutory grounds. Id., 392 Mass. at 212, 467 N.E.2d at 454. The Court ordered that Stock's diploma be rescinded and that Stock be provided with additional special education services if such services are found to be appropriate. Id., 392 Mass. at 214, 467 N.E.2d at 455. Defendants did not seek review of Stock I.

Soon after the Supreme Judicial Court's decision, plaintiff filed a timely request for an award of attorney's fees, pursuant to 42 U.S.C. § 1988 and on other grounds. See Petitioner's Appendix 81a-84a. In a second opinion, Stock v. Massachusetts Hospital School, 394 Mass. 437, 476 N.E.2d 210 (1985) ("Stock II"), the

Supreme Judicial Court held that fees should be awarded, and remanded the case to Superior Court for a determination of a reasonable fee award. 394 Mass. at 442; 476 N.E.2d at 213.

The Court awarded fees pursuant to 42 U.S.C. § 1988 after an extensive analysis of the implications of this Court's decision in Smith v. Robinson, _____ U.S. _____, 104 S.Ct. 3457 (1984). Stock II, 394 Mass. at 439-441, 476 N.E.2d at 211-13. The Supreme Judicial Court read Smith to prohibit a fee award based on § 1988 when an equal protection claim is the constitutional claim which provides the possible basis for fees, because Congress provided a comprehensive scheme in the E.A.H.C.A. to enforce those equal protection rights and did not include an attorney's fees award.

Id., 394 Mass. at 439-40, 476 N.E.2d at 212. However, the Supreme Judicial Court found that this Court's discussion of due process claims "strongly implies" that fees may be appropriate when procedural protection have been denied and the purpose of the due process challenge is to obtain the process which is constitutionally due. Id., 394 Mass. 437, 476 N.E.2d at 212. The S.J.C. found that Stock was a prevailing party who had substantial unaddressed due process claims, closely related to the statutory claims on which he prevailed. Id. It was on this basis that the case was remanded for an award of fees.[2]

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[2]The Court specifically found that a fee award was not appropriate for any future proceedings before the B.S.E.A., since the administrative scheme had now been invoked. 394 Mass. at 442, 476 N.E.2d at 213.

SUMMARY OF ARGUMENT

Certiorari is not warranted in this case first because there is no conflict among the circuits and state appellate courts on the issue raised by this case. In fact, all courts agree that, unlike equal protection claims, due process claims are not precluded by the E.A.H.C.A.

Even if there were a split among the circuits, the issue presented by this case does not reach the requisite level of importance to justify certiorari because it affects only the very small number of potential litigants who must resort to judicial remedies to gain access to the procedural protections of the E.A.H.C.A. Moreover, state and federal legislation is now pending which would expressly provide

for attorney's fees in special education cases and would effectively moot the petition. Because of the limited number of people affected by this issue and the likelihood that intervening legislation will resolve the this matter, the issue presented by petitioners does not warrant review by this Court.

Furthermore, the decision below was not final within the meaning of 28 U.S.C. § 1257, because issues relating to the determination of what is a "reasonable" attorney's fee, e.g., appropriateness of the requested hourly rate, of the amount of time charged, and of an enhancement factor, have not been decided and have been remanded to the trial court for resolution. It would be premature for this Court to grant certiorari before

these issues of federal law are ripe for review.

Finally, certiorari should not be granted because the Supreme Judicial Court was correct in finding that the E.A.H.C.A. does not preclude a § 1983 due process claim when a special education plaintiff must resort to judicial relief to obtain the procedural protections which are constitutionally due. Every court which has squarely addressed this issue after the Smith decision has agreed with the Supreme Judicial Court that fees may be awarded in such circumstances.

REASONS FOR DECLINING TO GRANT THE WRIT

I. THERE IS NO CONFLICT AMONG THE CIRCUITS OR STATE APPELLATE COURTS ON THE ISSUE RAISED BY THIS CASE.

One of the "special and important" reasons which may warrant review on writ of certiorari is that a state court of highest resort has decided a federal question in a way which conflicts with that of other state appellate courts or federal courts of appeals. U.S. Sup. Ct. Rule 17.1(a). Contrary to the assertions of petitioners, see Petition for Writ of Certiorari, 28-30, no such conflict exists in this case.

The issue addressed by the Massachusetts Judicial Court and discussed more fully in Part IV of this brief, is whether this Court's

reasoning and analysis in Smith v. Robinson, ____ U.S. ____, 104 S.Ct. 3457 (1984), of the relationship between the E.A.H.C.A. and 42 U.S.C. § 1988 allows an award of attorney's fees in cases in which a special education plaintiff must resort to judicial relief to force education officials to provide him with the process which is constitutionally due. See Stock, 394 Mass. at 441, 476 N.E.2d at 212. Besides the First Circuit's initial decision in Smith, Smith v. Cumberland School Committee, 703 F.2d at 4 (1st Cir. 1983), the defendants cite two other decisions which purportedly conflict with the Supreme Judicial Court's decision on this issue, Victoria L. v. District School Board, 741 F.2d 369, 372 (11th Cir. 1984) and Austin v. Brown Local

School District, 746 F.2d 1161, 1166 (6th Cir. 1984), and one court of appeals decision "expressing doubt" as to whether pre - Smith decisions relating to fees in special education cases are still good law. DeLeon v. Susquehana Community School District, 747 F.2d 149, 150 n.1 (3rd Cir. 1984). Petition for Certiorari, 29. Each of these cases is addressed in this section.

The First Circuit's decision in Smith v. Cumberland School Committee, supra is not even the law of the case after this Court's decision in Smith v. Robinson, supra. The First Circuit made no attempt to separately consider the relationship of equal protection and due process claims to the E.A.H.C.A., as this Court did. See Smith v. Cumberland School Committee,

703 F.2d at 7-9; Smith v. Robinson, 104 S.Ct. at 3470-71, n.17. The First Circuit is simply not an example of a case which has attempted to interpret and apply this Court's reasoning in Smith relating to due process claims and can in no way be said to "conflict" with the Supreme Judicial Court's Stock II decision.

The Eleventh Circuit decisions are also not in conflict with the Stock II decision. Petitioner cites Victoria L. v. District School Board, 741 F.2d 369 (11th Cir. 1984), but that case specifically points out that Smith does not "preclude a resort to § 1983 in a due process challenge." Id., at 372, citing Smith v. Robinson, ____ U.S. ____, 104 S.Ct. 3470 n.17. As the Eleventh Circuit explains in a more recent case, the reasoning in

Victoria L. in fact supports a finding that a separate due process claim may be brought by a special education plaintiff. Manecke v. School Board of Pinellas County, 762 F.2d 912, 920 (11th Cir. 1985). See Victoria L., 741 F.2d at 372. In Victoria L., after citing footnote 17, the court went on to analyze the plaintiff's procedural claims and found no violation of the E.A.H.C.A. and therefore no violation of due process requirements. Id., at 372-74. In Manecke the Eleventh Circuit, based on an analysis of Smith, found that the dismissal of a special education plaintiff's § 1983 due process claim was improper and remanded for further proceedings. Manecke, 762 F.2d at 917-921. See discussion infra; pp. 31 - 32. The Eleventh Circuit

decisions are not in conflict with the Supreme Judicial Court's decision and instead expressly support the Supreme Judicial Court's reasoning that a separate due process claim is not inconsistent with the E.A.H.C.A.'s comprehensive scheme.

In Austin v. Brown Local School District, 746 F.2d 1161 (6th Cir. 1984), the Sixth Circuit also noted that Smith requires due process claims to be treated differently from equal protection claims. Id., 746 F.2d at 1165-6. However, the court goes on to find that the Austin plaintiffs made no separate due process claim in their complaint and therefore the court had no occasion to determine appropriateness of such a claim in that case. Id., 746 F.2d at 1166. Indeed, since the Austin plaintiff's arguable due

process claim was one of "substantive" due process, Id. at 1165, it probably would not have come with exception for procedural due process claims allowed by Smith. See discussion, infra at 31 - 38. Austin is not in conflict with Stock II.

Finally, in DeLeon v. Susquehanna Community School District, 747 F.2d 149 (3rd Cir. 1984), the Third Circuit expressly does not decide what § 1983 remedies may be available after Smith, Id. at 150 n.1 and does not address at all this Court's distinction between due process and equal protection claims in Smith. Indeed, the court had no occasion to address the distinctions between due process and equal protection claims since it found that no procedural violations occurred in

this case. Id. at 154. DeLeon is not inconsistent with the Stock II decision.

Far from being a conflict among the circuits and state appellate courts, the cases cited by defendants are consistent with the reasoning of the Massachusetts Supreme Judicial Court in Stock II. These cases and others discussed infra, have holdings which support that of the Supreme Judicial Court. There is no conflict among the lower appellate courts and certiorari is not warranted.

II. THE QUESTION PRESENTED DOES NOT WARRANT A GRANT OF CERTIORARI BECAUSE OF THE LIMITED IMPORTANCE OF THE ISSUE AND BECAUSE OF THE LIKELY ENACTMENT OF STATE AND FEDERAL LEGISLATION AUTHORIZING ATTORNEYS FEES IN SPECIAL EDUCATION PROCEEDINGS.

The grant of a writ of certiorari is purely discretionary, Hicks v. Miranda, 422 U.S. 332, 344 (1975), and is only granted when important issues of federal law are presented which warrant resolution by this Court. Rule 17, U.S. Sup. Ct. Rules. See U.S. v. Oregon, 366 U.S. 643, 645 (1961); Commonwealth of Pennsylvania v. Nelson, 350 U.S. 497, 499 (1956); Rice v. Sioux City Memorial Parks Cemetery, 349 U.S. 70 (1955). The issue presented by defendants' petition does not rise to the requisite level of importance both because of the limited impact of this issue on a very limited number of people involved in E.A.H.C.A. liti-

gation, and because state or federal attorney's fees legislation is likely to be enacted which will resolve this issue without further Court involvement.

A. The question of whether attorney's fees may be available to special education plaintiffs has limited impact, even on the small group of potential special education plaintiffs.

The question presented in defendants' petition relates only to attorney's fees for successful litigation of claims relating to denial of procedural due process. See discussion, infra. The issue has little, if any, impact outside the special education area, only affects those few students and parents who go beyond the administrative hearing level to court review,[3] and

[3]The Massachusetts Department of Education estimates that a total of 12 special education cases are taken to court by parents or school officials each year. This estimate may be high.

of those, only affects those who prevail on claims relating to procedural due process. While respondent has no statistical study of the cases, it is his counsel's experience and observation in litigating special education cases and reading special education case law, that the vast majority of special education cases which reach the courts involve exclusively or nearly exclusively issues relating to the substantive appropriateness of particular special education services, the type of claims for which this Court foreclosed fee awards under § 1988, see Smith, 104 S.Ct. at 3469-70. Some cases may have minor related procedural claims, but many of those will be ones, which, like the claims raised by the plaintiffs in Smith, do not warrant a fee award, because the due process claims were

unrelated to the claims on which plaintiffs were successful. See Smith, 104 S.Ct. at 3470-71. It is the rare case that, like Stock, relates exclusively to denial of constitutional and statutory procedural protections. Because the issue is so discrete and relates to such a small category of cases, it does not warrant review by this Court.

B. Enactment of special education attorney's fees legislation by Congress or the Massachusetts legislature is likely to moot the issue of whether fees are available pursuant to § 1988.

There are bills proceeding through both Congress and the Massachusetts General Court which would eliminate the need to resolve the issue raised by petitioners. Senate 842, an Act Providing for Equal Access to Certain Special Education Proceedings, was introduced in this year in the Massachusetts legislature by the Senate Chair-

man of the Committee on Education. The bill would allow special education a plaintiff who prevails in either administrative or judicial proceedings to receive an award attorney's fees and costs associated with that appeal.[4]

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[4]S. 842 provides:

> Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:
>
> SECTION 1. Section 1N of Chapter 15 of the General Laws is hereby amended by adding at the end thereof the following sentences: --
>
> Such Bureau shall award to the parents, guardians or persons with custody of such child or children their reasonable fees for representation (at a rate not to exceed seventy-five dollars per hour), costs and expenses to be paid to them by the school committee where the Bureau or the State Advisory Commission finds that such fees, costs and expenses have been incurred by reason of such school committee's failure or refusal to prepare, adopt or implement an education plan which is in compliance with the requirements of Chapter 71B

(footnote continued)

The bill has received a favorable report

(footnote continued from preceding page)

or applicable federal law. The Commonwealth shall reimburse each city or town one hundred percent of the cost imposed by the preceding sentence.

SECTION 2. Section 3 of Chapter 71B of the General Laws is hereby amended by inserting at the end thereof the following new paragraph: --

The court, including a federal court, in any proceeding brought pursuant to this section or in any appeal under Chapter 30A of a decision or action rendered pursuant to this section or sections 1M or 1Q of Chapter 15 of in any action based on a claim that a school committee has fialed or refused to prepare, adopt or implement an education plan which is in compliance with the requirements of this chapter or applicable federal law shall order a school committee to pay to the parents, guardians or persons with custody of a child their reasonable fees for representation (at a rate not to exceed seventy-five dollars per hour), costs and expenses incurred in connection with their successful prosecution or defense of such proceeding, including any such fees, costs or expenses incurred in connection with administrative proceedings. The Commonwealth shall reimburse each city and town one hundred percent of the costs imposed by this paragraph.

from the Joint Committee on Education and awaits action by the Senate Committee on Ways and Means.

Similar legislation has also been filed in Congress. H.R. 1523 and S.415 would expressly provide for attorney's fees in special education cases. S.415 has been passed by the United States Senate with support from the administration.

Enactment of either the state or federal legislation would effectively moot this petition. Even if the narrow issue raised by defendants warrants an authoritative resolution by this Court at some later date, it would be prudent to defer that consideration until Congress and the Massachusetts General Court have had an opportunity to decide whether or not to enact their own resolution of the whole issue of attorney's fees in special education cases.

Because the issue raised by defendants affects such a small category of cases and is likely to be resolved by intervening legislation, it is not of sufficient importance to warrant a grant of the Petition for Certiorari.

III. THE SUPREME JUDICIAL COURT DECISION WAS NOT "FINAL" WITHIN THE MEANING OF 28 U.S.C. § 1257.

For review by this Court to be proper, the decision of the Supreme Judicial Court must be final. 28 U.S.C. § 1257. In this case, the Supreme Judicial Court's decision was not final because it has remanded the case for further proceedings which will address application of 42 U.S.C. § 1988 to the facts of this case.

The finality requirement is "not one of those technicalities to be easily scorned, [but an] important factor in

the smooth working of our federal system." Radio Station WOW v. Johnson 326 U.S. 120, 124 (1945) (Justice Frankfurter); see also North Dakota Pharmacy Board v. Snyder Stores, 414 U.S. 156, 160 (1973). When review of a state court decision is at issue, the rule derives added force because there exists potential conflict between the courts of two different governments. North Dakota Pharmacy Board, 414 U.S. at 159; Radio Station WOW, 326 U.S. at 124. Most importantly, the rule avoids piecemeal litigation. North Dakota Pharmacy Board, 414 U.S. at 159; see also Flynt v. Ohio, 451 U.S. 619, 621, (1981).

In some circumstances this Court has taken a more pragmatic approach to the finality issue, even when further state court proceedings are required,

such as when the results of the proceedings are preordained or ministerial or when the further proceedings could not remotely give rise to further federal questions. Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 479-80 (1975). However, the circumstances of this case do not fit into those exceptions.

Although the Supreme Judicial Court has decided that plaintiff is entitled to a fee award, the Court remanded the case to Superior Court for a determination of the amount of the award. Stock II, 394 Mass. at 441-2, 476 N.E.2d at 213. Thus the posture of this case is similar to the eminent domain cases, where the further proceedings address federal issues of "just compensation," an integral part of the federal question which may eventually require Supreme Court review.

See Grays Harbor Co. v. Coats-Fordney Co. , 243 U.S. 251, 256 (1917). See also North Dakota Pharmacy Board, 414 U.S. at 163. On remand from the Supreme Judicial Court the Superior Court will be required to determine what is a "reasonable" attorney's fee under 42 U.S.C. § 1988, using factors such as those discussed in Blum v. Stenson, 104 S. Ct. 1541 (1984). Questions are likely to arise regarding whether the claimed rate and number of hours are reasonable, see Blum, 104 S. Ct. at 1458, and whether an "enhancement factor" is warranted under the standard set by Blum, 104 S. Ct. at 1548-50. Taking this case for review before these additional federal issues are ripe for review would be likely to result in piecemeal litigation inconsistent with the policy represented by

the finality requirement of 28 U.S.C. § 1257. See Flynt, 451 U.S. at 4921; North Dakota Pharmacy Board, 414 U.S. at 159-60. The lack of finality of the Supreme Judicial Court is another reason that the writ should be denied.

IV. CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE SUPREME JUDICIAL COURT CORRECTLY INTERPRETED AND APPLIED SMITH v. ROBINSON.

After careful analysis of this Court's decision in Smith v. Robinson, 104 S. Ct. 3457 (1984) and with the benefit of the same arguments made in defendants' Petition for Certiorari as well as the circuit court decisions in Rose v. Nebraska, 748 F.2d 1258, 1263 (8th Cir. 1984), petition for cert. filed sub nom. Lutjeharms v. Rose No. 84-1534, 53 U.S.L.W. 3718 (March 15, 1985) and Teresa Diane P. v. Alief

Independent School District, 744 F.2d 484, 491 (5th Cir. 1984), the Massachusetts Supreme Judicial Court found that Smith "strongly implies" that education agencies are not exempt from § 1988 fee award when a special education plaintiff must resort to judicial relief to obtain procedural protections which are constitutionally due. Stock II, 394 Mass. at 441, 476 N.E.2d at 212. This conclusion was correct and is supported by every Court which has squarely addressed the issue. See Rose, 748 F.2d at 1263; Teresa Diane P., 744 F.2d at 491; Blazejewski v. Board of Education, 599 F. Supp. 975 (W.D.N.Y. 1985).[5]

[5]Even those Courts which do not address the attorney's fees issue squarely, support the proposition that the E.A.H.C.A. was not intended to preclude separate due process claims even though it does preclude separate equal protection claims. Manecke v. School Board of Pinellas County, 762 F.2d 912, 920 (11th Cir. 1985). See discussion supra. Austin v. Brown Local School District, 746 F.2d 1161, 1166 (6th Cir. 1984).

A. Smith supports an award of attorneys' fees when a special education plaintiff has had to resort to judicial relief to force education officials to provide him the procedural protections that were constitutionally due.

In Smith, this Court found that violations of the E.A.H.C.A. itself did not provide a basis for § 1983 jurisdiction, Smith, 104 S. Ct. at 3468 n. 11, and that similar claims of discrimination in provision of special education services in violation of the Equal Protection clause or § 504 of the Rehabilitation Act, also will not usually provide an appropriate basis for § 1983 jurisdiction and for a fee award under § 1988 in a special education case.[6] Id., 104 S. Ct. at 3468-70, 3471-74. The Court reasoned that

[6]Plaintiff made no equal protection claim, and did not pursue his Rehabilitation Act claim.

Congress placed the primary responsibility on the states to enforce the statute and devised a "comprehensive scheme" of procedures, without attorney's fees, to assure that enforcement:

> [T]he Act establishes an elaborate procedural mechanism to protect the rights of handicapped children. The procedures not only ensure that hearings conducted by the State are fair and adequate. They also effect Congress' intent that each child's individual educational needs be worked out through a process that begins on the local level and includes ongoing parental involvement, detailed procedural safeguards, and a right to judicial review. §§ 1412(4), 1414(a)(5), 1415. See also S. Rep. No. 94-168, at 11-12 (emphasizing the role of parental involvement in assuring that appropriate services are provided to a handicapped child.) Smith, 104 S. Ct. at 3468, citing Board of Education v. Rowley, 458 U.S. 176, 208-209 (1982).

On the other hand, the Court recognized that when state or local officials do not provide the procedural protections of that comprehensive scheme, a special

needs student may have a due process claim which would entitle him to attorney's fees, if successful:

> [U]nlike an independent equal protection claim, maintenance of an independent due process challenge to state procedures would not be inconsistent with the EHA's comprehensive scheme. ... And, while Congress apparently has determined that local and state agencies should not be burdened with attorney's fees to litigants who succeed, through resort to the procedures outlined in the EHA, in requiring those agencies to provide free schooling, there is no indication that agencies should be exempt from a fee award where plaintiffs have had to resort to judicial relief to force the agencies to provide them the process they were constitutionally due. (emphasis supplied) Smith, 104 S. Ct. at 3470, n.17.

In other words, while adherence to the procedural protections provided by Congress in the EAHCA will shield an educational agency against attorneys' fees in most special education cases, failure or refusal to provide procedural protections leaves an EAHCA defendant

in the same position as any other civil rights defendant, i.e., liable for attorney's fees to a prevailing plaintiff who prosecutes a "substantial" due process claim, whether or not that claim was the basis of the judicial resolution or settlement. Rose, 748 F.2d at 1263. See Smith, 104 S. Ct. at 3466; Maher v. Gagne, 448 U.S. 122, 130-1 (1980); Blazejewski, 599 F. Supp. at 978-9.

In Smith this Court declined to award fees on one of plaintiff's due process claims relating to the independence of the hearing officer. The rationale was that the independent hearing officer claim involved an entirely different legal theory, based on different facts, and warranted entirely different relief than the claim on which plaintiff prevailed, i.e., which agency would pay for the

plaintiff's educational program. Smith, 104 S. Ct. at 3471. In contrast plaintiff's due process claim in this case was based on the same facts, relied on similar legal theories, and required the same relief as the one on which he prevailed. See discussion, infra.[7]

Although Smith did limit the availability of fees for special education plaintiffs, awards pursuant to 42 U.S.C. § 1988 are still appropriate for the prevailing plaintiffs who must resort to judicial proceedings to force education officials to provide them with the process which they are

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[7]In Smith itself this Court did not disturb the fee award made to plaintiff for work done on the preliminary injunction, even though the claim for continuing the status quo was available both as a constitutional claim and pursuant to the E.A.H.C.A., 20 U.S.C. § 1415(e)(3). See Smith, 104 S. Ct. at 3467. See also Rose, 748 F.2d at 1263-4.

constitutionally due. Smith, 104 S.Ct. at 3471 n.17. Teresa Diane P., 744 F.2d at 491; Rose, 748 F.2d at 1263; Stock II, 394 Mass. at 441, 476 N.E.2d at 212.[8]

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[8]The defendants' description of the analysis by the Eighth Circuit, the Fifth Circuit, and the Supreme Judicial Court of Massachusetts as "fallacious reasoning," Petition for Certiorari, 30, is at best hyperbole.

It is defendants who mistake the reasoning in Smith by claiming that both due process and equal protection claims are precluded by the E.A.H.C.A., Petition for Certiorari, 23-4, and by ignoring the assumption underlying the Court's preclusion analysis, i.e., that access to the procedures of the Act have assured that the substantive requirements of the Act are being adhered to. See Smith, 104 S. Ct. at 3468-70.

B. A fee award to plaintiff was appropriate under the Smith standard.

The facts of the Stock case provide a remarkably good example of the circumstances in which attorney's fees are warranted under the Smith analysis. The defendants violated virtually all the state and federal regulations designed to assure full parental involvement and adequate notice of a change in educational placement. Stock I, 392 Mass. at 211-212, 467 N.E.2d at 453-4. Moreover, they did so in circumstances that resulted in not just a change in placement, but complete termination of special education services for plaintiff. Id., 392 Mass. at 208, 467 N.E.2d at 452. Furthermore, it was not local school officials, but officials and agents of the Department of Education which failed to comply with

the comprehensive procedural scheme which the Department is partly responsible for devising and statutorily obliged to enforce, Id., 392 Mass. at 206-7, n.3; 212, n.11, 467 N.E.2d at 451 n.3, 454 n.11; see also 20 U.S.C. § 1412(6); G.L. c.15 §1M. Even when plaintiff made a final attempt to give defendants an opportunity to redress the procedural problems through the administrative hearing process, those efforts were rebuffed by the Department of Education. Stock II, 392 Mass. at 209, 467 N.E.2d at 452.

Nor is this a situation, as with the Smith plaintiff's independent hearing officer claim, where the constitutional claim involves distinctly different facts, legal theories, and relief. See Smith, 104 S. Ct. at 3471. Stock's due process claim used virtually

the same facts, relied on related legal theories, and warranted the same relief he received for the statutory claims on which he prevailed. Stock II, 394 Mass. at 441, 476 N.E.2d at 212.

This case meets the Smith criteria for attorney's fees because plaintiff Stock had to resort to judicial remedies to obtain adequate procedural protection. Smith, 104 S. Ct. at 3470-71 n.17. The Supreme Judicial Court determined that only through resort to judicial action was Stock afforded the opportunity to participate in the education decision-making process envisioned by the EAHCA. Stock II, 394 Mass. at 441, 476 N.E.2d at 212.

Finally, although the Supreme Judicial Court did not need to reach the constitutional due process claim, Stock I, 392 Mass. at 205 n. 12, 467 N.E.2d at 454 n. 12, it found that there

could be no serious dispute that Stock was a prevailing party with a substantial [9] unaddressed constitutional claim, which entitled him to fees. Stock II, 394 Mass. at 441, 467 N.E.2d, at 213. See Smith, supra, 104 S. Ct. at 3466 (Congress did not intend for the authority to award attorney's fees to be extinguished by the fact that the case was resolved on a related non-constitutional ground, citing Maher v. Gagne, 448 U.S., 122, 132 (1980)) Rose, 748 F.2d at 1263.

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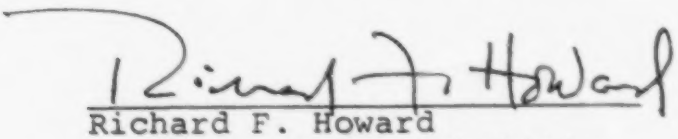
[9] Plaintiff had argued that public education is a "property interest" protected by the Due Process clause of the Fourteenth Amendment, Goss v. Lopez, 419 U.S. 565, 573-4 (1975) and that plaintiff and his parents were essentially excluded from the decision-making process and given no notice of their opportunity to challenge the complete termination of plaintiff's public education, and thereby denied due process.

Because plaintiff had to resort to judicial relief to secure the process to which he was constitutionally due, he was properly awarded attorney's fees pursuant to 42 U.S.C. § 1988.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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Counsel of Record

Dated: August 9, 1985

rights as guaranteed by Chapter 71B of the General Laws, and by 20 U.S.C. §1415.

2. That the Brayton High School diploma issued to Richard Stock be rescinded.

3. That the Department of Education shall take jurisdiction and hold a hearing, pursuant to G.L. c. 71B, §3 and 20 U.S.C. §1415(b)(2) on the matter of providing special education services to Stock. Should it determine that further services are appropriate, the Department shall take into account the period of about three years which has elapsed since the initial graduation in June, 1981. This time period shall be added to Stock's period of eligibility for special education services. Thus, he may receive such services beyond the normal termination age of twenty-two, although the

Department is not necessarily precluded from terminating Stock's special education services on some basis other than age. The Department may consider plans for services under G.L. c. 71B, §§12A-12C, inserted by St. 1983, c. 688.

4. The Superior Court shall retain jurisdiction of this matter to insure strict compliance with the procedural safeguards specified by G.L. c. 71B, §3, 20 U.S.C. §1415 and; 34 C.F.R. §§300.500-300.513.

s/s
William G. Young
Justice of the
Superior Court

Dated: October 31, 1984

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH,

At Boston, April 8, 1985.

In The Case No. SJC-3280

RICHARD STOCK

vs.

MASSACHUSETTS HOSPITAL SCHOOL & others

pending in the Superior Court Department of the Trial Court for the County of Suffolk No. 56190.

ORDERED, that the following entry be made in the docket; viz., --

The judge in the Superior Court is to determine the appropriate fee award. The plaintiff also is to have the costs of the appeals.

By the Court,

s/s [Jean M. Kennett] ,
Clerk.

April 8, 1985

See opinion on file.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT
CIVIL ACTION NO. 56190

RICHARD STOCK, a mentally disabled person, by and through his next friend, JOSEPH STOCK,

PLAINTIFF,

V.

Massachusetts Hospital School, Massachusetts Department of Education, JOHN BRITT, as he is Superintendent of Massachusetts Hospital School, JOHN LAWSON, as he is Commissioner of the Department of Education, ROBERT POWERS, as he is the Director of the Bureau of Institutional Schools, and LORRAINE ATKIN, as she is Program Manager for the Brayton High School at the Massachusetts Hospital School,

DEFENDANTS

COMPLAINT

Introductory Statement

1. This is a civil action for declaratory and injunctive relief, enforcement

of state and federal special education statutes, G.L. c. 71B and the Education of All Handicapped Children Act (E.A.H.C.A., 20 U.S.C. s.1401 et seq.), s.504 of the Rehabilitation Act of 1973, 42 U.S.C. s.1983, and the Due Process protections of the Constitutions of the United States and of Massachusetts. Plaintiff requests declaratory and injunctive relief against state agencies and state officials who terminated special education services to Plaintiff by "graduating" him from the Massachusetts Hospital School without requisite procedural protections and despite plaintiff's lack of academic skills.

Jurisdiction

2. This Court has jurisdiction over the subject matter of this action

pursuant to G.L. c. 214 s.1 et seq., c. 231, ss.1-3, and c. 249, s.5.

Parties

3. Richard Stock is a twenty-year-old, multiply handicapped young man, who developed a brain tumor at age ten, is mildly mentally retarded, paraplegic, and has significant reasoning and comprehension deficits. He prosecutes this matter through his father and next friend, Joseph Stock.

4. The Massachusetts Hospital School is an institution for multiply disabled children in Canton, Massachusetts operated by the Department of Public Health. The Brayton High School is the school program at the Hospital School and is operated by a program manager who is jointly appointed by the superintendent

of the Hospital School and the Commissioner of Education.

5. The Massachusetts Department of Education is the State Education Agency which is charged with the responsibility of assuring implementation of G.L. c. 71B and the E.A.H.C.A. and which operates the school programs in various state institutions through its Bureau of Institutional Schools.

6. John Britt is the superintendent of the Massachusetts Hospital School and as such has the responsibility for the operation of the Hospital School program and has the joint responsibility to supervise the program manager for educational component of the Hospital School.

7. John Lawson is the Commissioner of the Department of Education and as such has overall responsibility for the

operation of the department, including the Bureau of Institutional Schools and the Bureau of Special Education Appeals within the division Special Education. He also jointly appoints the program manager for the school programs within the various state institutions.

8. Robert Powers is the Director of the Bureau of Institutional Schools (B.I.S.) of the Division of Special Education of the Massachusetts Department of Education. As director of the Bureau he has the authority and responsibility to supervise the B.I.S. program managers in the various institutions, to assure that appropriate special education services are provided according to state and federal law.

9. Lorraine Atkin is the program

manager at the Brayton High School of the Massachusetts Hospital School and is jointly appointed by the superintendent of the Hospital School and the Commissioner of Education. As such, she is responsible to insure that each special needs student at the Hospital School receive appropriate special education in compliance with federal and state law.

Facts

10. Plaintiff was diagnosed as having a brain tumor at age ten and since that time has had chemotherapy and radiation to his brain and spinal cord.

11. Due in part to the brain tumor and treatments for that tumor, plaintiff has developed significant deficits in reasoning and short-term memory as well

as motivation and behavior problems. Plaintiff also has substantial difficulty walking, even with leg braces, and usually must use a wheelchair.

12. Plaintiff was treated at Boston City Hospital, Newton-Wellesley Hospital, Kennedy Memorial Hospital, and entered the Massachusetts Hospital School in August of 1976 at age 14.

13. During his stay at the Hospital School, plaintiff received special education services at the Brayton High School program from staff employed by or under contract with the Massachusetts Department of Education.

14. At no time during plaintiff's stay at the Hospital School did representatives of the Wrentham Public Schools arrange or provide evaluations for plain-

tiff or participate in the development of his Individual Education Plan.

15. During plaintiff's stay at the Hospital School he has shown substantial impairment in memory, reasoning, and problem-solving ability and has failed to continue gaining information and skills.

16. During plaintiff's stay at the Hospital School, his tested Intelligence Quotient has declined.

17. In the fall of 1980, a group of teachers met and developed an Individual Education Plan for plaintiff for the 1980-81 school year.

18. Neither plaintiff nor his parents were present or invited to the meeting at which plaintiff's 1980-81 I.E.P. were developed.

19. No representatives of any state agency under the Executive Office of Human Services was invited to or participated in the meeting to devise plaintiff's 1980-81 I.E.P., nor did the chairperson of the Regional Interdepartmental Children's Project Team receive notification of or participate in the development of plaintiff's 1980-81 I.E.P.

20. Massachusetts Hospital School and Brayton High School officials knew at the time that plaintiff's 1980-81 I.E.P. was written, that they intended for plaintiff to receive a high school diploma at the end of the 1980-81 school year.

21. Plaintiff's 1980-81 I.E.P. indicated that it covered the period, September, 1980 to September 1981. Graduation was not mentioned in the I.E.P.

22. At no time were plaintiff's parents offered the opportunity to reject or accept the 1980-81 I.E.P., nor were they informed of their opportunity to decline graduation or challenge the graduation decision through the special education appeals process.

23. Plaintiff signed the 1980-81 I.E.P. himself on or about January 28, 1981. Upon information and belief, the matter of graduation was not explained to him at that time.

24. Even if the matter of graduation was discussed with plaintiff at the time he signed the I.E.P., defendant officials knew that plaintiff lacked the capacity to understand the implications of graduation.

25. Plaintiff was not informed of his opportunity to decline graduation or to challenge graduation through the special education appeals process.

26. Massachusetts Hospital School and Brayton High School officials were repeatedly advised by representatives of the Department of Mental Health and the Massachusetts Office for Children that appropriate services would not be available for plaintiff after graduation and that he should not graduate.

27. Plaintiff was presented with a Brayton High School diploma in June of 1981.

28. Since June of 1981, plaintiff has remained in residence at the Hospital School, but without special education services.

29. From January of 1982 to the present time plaintiff has participated in an evaluation program arranged by the Massachusetts Rehabilitation Commission. Plaintiff has been given repeated extensions of the initial sixteen-week evaluation period, but has not come close to the twenty-five percent production rate necessary to qualify for long-term M.R.C. services.

30. Plaintiff is operating at eight to fourteen percent (8-14%) production rate and is unlikely to achieve the necessary twenty-five percent production rate in the foreseeable future. Even if plaintiff did meet the required production rate, there would be a substantial wait before plaintiff would be able to enter M.R.C.'s long-term program.

31. When the Department of Mental

Health (D.M.H.) formally notified plaintiff in June of 1981 that they would not provide him with services, defendant Britt responded by notifying D.M.H., purportedly on plaintiff's behalf, that plaintiff would not exercise his right to appeal D.M.H.'s decision.

32. Massachusetts Hospital School and Brayton High School graduates in 1982 were given the opportunity to decline to graduate and continue receiving special education services.

33. Plaintiff has not attained those skills generally expected of a high school graduate by potential employers or institutions of higher learning.

34. Defendants have refused to give plaintiff the opportunity to return his diploma and to continue receiving special education services.

35. Plaintiff continues to need special education services and is now failing to gain and losing skills because of the lack of appropriate special education services.

36. At all times pertinent to these claims defendants have been acting under color of state law.

37. Defendant Massachusetts Hospital School intends to discharge plaintiff on or before September 10, 1982.

38. There is presently no available appropriate place for plaintiff to reside or to receive appropriate educational or training services unless special education funding is available.

39. Plaintiff would be irreparably harmed by discharge from the Massachusetts Hospital School without an alternative residential placement being made available.

Statement of Claims

COUNT I: G.L. c. 71B; E.A.H.C.A.

40. Defendants' failure to include plaintiff or his parents in the meeting which developed his 1980-81 Individual Education Plan (I.E.P.) violated their obligations, under G.L. c. 71B, and the Education of All Handicapped Children's Act, 20 U.S.C. S.1401 et. seq. (E.A.H.C.A.).

COUNT II: G.L. c. 71B; E.A.H.C.A.

41. Defendants' failure to specifically address graduation in the 1980-81 I.E.P. and to inform plaintiff and his parents of all program options available to them and of their right to decline graduation or challenge the graduation

decision through the administrative appeals process violated his rights under G.L. c. 71B and the E.A.H.C.A.

COUNT III: G.L. c. 71B

42. Defendants' failure to include representatives of agencies under the Executive Office of Human Services in the meeting to devise plaintiff's 1980-81 I.E.P. violated their obligations under G.L. c. 71B and regulations promulgated pursuant thereto.

COUNT IV: G.L. c. 71B; E.A.H.C.A.

43. Defendants' issuance of a high school diploma to a student who was not fully informed of the consequences of accepting that diploma, who was severely disabled and had substantial need of continuing special education services,

who had not reached his twenty-second birthday and who had not attained the skills generally expected of a high school graduate constitutes a violation of G.L. c. 71B and the E.A.H.C.A.

COUNT V: G.L. c. 71B; E.A.H.C.A.

44. The failure of the defendants, Massachusetts Department of Education, Lawson, Powers, and Atkin to insure that the Massachusetts Hospital School provide full educational opportunity to plaintiff, that plaintiff receive the maximum feasible benefit from special education services, and that the Massachusetts Hospital School complies with the requirements of state and federal special education laws constitutes a violation of G.L. c. 71B and the E.A.H.C.A.

COUNT VI: REHABILITATION ACT

45. Defendants' termination of special education services to plaintiff and issuance of a diploma to him despite his lack of academic skills and without fully informing him of the consequences of and options to graduation, constitute a violation of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. s.794.

COUNT VII: DUE PROCESS

46. Defendants' failure to fully inform plaintiff of the consequences of and options to graduation, failure to give plaintiff or his parents an opportunity to participate in the meeting when the graduation decision was made, and

defendants' failure to give plaintiff or his parents notice of and opportunity to challenge that decision constitute a violation of the Due Process protections of the Fourteenth Amendment to the United States Constitution and of the Declaration of Rights of the Massachusetts Constitution.

Prayers for Relief

WHEREFORE, plaintiff requests that this Court:

1. Issue a Preliminary Injunction:

   (a) Barring defendants from discharging plaintiff from the Massachusetts Hospital School until alternative appropriate day and residential placements are secured.

(b) Requiring defendants to forthwith take all steps necessary to assure that plaintiff receive appropriate residential and educational or training services.

2. After hearing on the merits enter judgment declaring that defendants' actions have violated their obligations and plaintiff's rights as described in Count I-VII.

3. Enter a permanent injunction requiring defendants, their agents, employees and successors to:

(a) Take all steps necessary to assure that plaintiff receives appropriate spe-

cial education services until his twenty-second birthday.

(b) Take all steps necessary to assure that plaintiff and his parents be given the opportunity to participate in development of his I.E.P. and each annual revision.

(c) Inform each potential graduate of the Brayton High School program and his or her parents, at the time the expected final I.E.P. is developed, of the consequences of and options to graduation, and that the student or parent may decline graduation

or challenge graduation through the special education appeals process.

4. Enter a permanent injunction requiring defendants, Massachusetts Department of Education, Lawson, and Powers to:

(a) Promulgate standards and regulations which assure that all B.I.S. programs will fully inform potential graduates and their families of the consequences of and options to graduation and which insure that B.I.S. programs not require students to graduate unless they have attained a level of skill generally expected

of high school graduates by employers and institutions of higher learning.

(b) Take steps necessary to assure that all B.I.S. programs give each student, his or her parents, the opportunity to participate in the development of that student's I.E.P. and that each student and parent be given a full explanation of their rights to free independent evaluations and to challenge the proposed I.E.P.

5. Award reasonable attorney's fees.

6. Grant such other relief as the Court deems proper.

PLAINTIFF,

By his attorney,

s/s
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Dated: July 23, 1982

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Voice and TTY

June 29, 1984

Chief Justice Edward Hennessey
Supreme Judicial Court
New Courthouse
Pemberton Square
Boston, MA 02108

Re: Request for Award of Attorney's Fees
Stock v. Massachusetts Hospital School,
No. 56190

Dear Chief Justice Hennessey:

I write to you because Rule 27, M.R.A.P. requires that a Petition for Rehearing be presented by letter to you and because I have not been able to determine what other pleading is available to pursue my request. My request is for

an award of attorney's fees by this Court in the above case. I bring this matter to you to avoid being told by the Superior Court judge that your decision in Mellor v. Berman, 390 Mass. 275 (1983) prohibits him from awarding fees for my appellate work. I also believe that the Superior Court would appreciate your guidance on whether a fee award is appropriate in this case. I ask that you accept this request for an award of attorney's fees, whether or not I have chosen the appropriate procedural vehicle.

I am requesting an award of costs and attorney's fees to plaintiff pursuant to 42 U.S.C. §1988. The basis for this claim is that plaintiff-appellant's complaint included a non-frivolous constitutional claim pursuant to 42 U.S.C. §1983

and is therefore entitled to fees pursuant to the United States Supreme Court decision in Maher v. Gagne, 448 U.S. 122 (1980).

There are numerous federal court decisions awarding attorneys fees under similar circumstances in Education of All Handicapped Children Act cases, e.g., Monahan v. Nebraska, 687 F.2d. 1164 (8th Cir. 1982); Robert M. v. Benton, 671 F.2d 1104 (8th Cir. 1982); Jose P. v. Ambach, 669 F.2d 865 (2nd Cir. 1982); Mattie T. v. Holladay, 522 F.Supp. 72 (N.D. Miss. 1981). The Court of Appeals for the First Circuit has declined to award attorneys fees in a special education case. Smith v. Cumberland School Committee, 703 F.2d. 4 (1st Cir. 1983), cert. granted sub nom, Smith v. Robinson, 104 S.Ct. 334 (1984). The Supreme Court has

heard argument on the Smith case and a decision is expected soon.

If argument would be necessary or helpful for the Court in its consideration of this matter, I respectfully request that the Court set a briefing schedule.

Thank you for your consideration.

Very truly yours,

s/s
Richard F. Howard
Attorney for Plaintiff-
Appellant,
Richard Stock

RFH:pb
cc: Judith Yogman, AAG